IN THE MATTER OF LICENSE NO 17751 MERCHANT MARINER'S DOCUMENT Z-390 381-D2 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Richard H. BEARD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1787

Richard H. BEARD

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 19 August 1968, an Examiner of the United States Coast Guard at Seattle, Washington revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as an AB seaman on board SS HARVARD VICTORY under authority of the document above described, on or about 10 October 1966, Appellant, while the vessel was at Saigon, Viet Nam, assaulted and battered by beating with his fists and kicking with his feet a fellow crewmember, one Alfred A. Bruce.

At the hearing, Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence a voyage record of HARVARD VICTORY and the testimony of two witnesses obtained by deposition on written interrogatories.

In defense, Appellant offered in evidence the testimony of two witnesses obtained by deposition on written interrogatories.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 20 August 1968. Appeal was timely filed on 22 August 1968 and perfected on 26 September 1968. Appellant did not comply with the Examiner's orders until 24 June 1969.

FINDINGS OF FACT

On 10 October 1966, Appellant was serving as an AB seaman on board SS HARVARD VICTORY, and acting under authority of his document while the ship was in the port of Saigon, R.V.N. Because of the disposition to be made of this case, no further findings of fact are made.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Because of the disposition to be made of this case, not all of Appellant's points will be set out. Those that are dealt with, to resolve questions on any further proceedings, will be mentioned in the Opinion.

APPEARANCE: Richard Glynn, National Maritime Union, Seattle, Washington.

OPINION

I

Appellant objects that he was subjected to double jeopardy because he was tried and acquitted in a U. S. District Court on an indictment charging in various counts offenses ranging from assault with intent to kill down to simple assault. The instant action under R.S. 4450 is said to constitute double jeopardy.

It does not. A criminal proceeding resulting in a judgement of conviction authorizes imposition of a fine or imprisonment or both. The proceedings under R.S. 4450 are not penal (Decision on Appeal No. 1574) and look only to suspension or revocation of seaman's documents. Therefore Appellant is not being "tried" twice for the same offense in the sense of being twice put in "jeopardy". To face suspension or revocation of seaman's documents is not to be placed in jeopardy.

II

Appellant declares that his acquittal in the criminal proceeding should bar the R.S. 4450 proceeding. As the Examiner pointed out, standards of proof differ in the proceedings. The standard of proof in a Federal criminal proceeding is proof "beyond a reasonable doubt". The standard of proof in suspension and revocation proceedings is only that of "substantial evidence".

It follows that a judgment of conviction in a Federal court, when the acts in question were the same as are at issue in the R.S. 4450 proceeding, would be conclusive in an R.S. 4450 proceeding, while an acquittal, which may be considered as evidence by an examiner, is not binding upon him.

III

Appellant asserts that because charges under R.S. 4450, for the misconduct charged in this case, had earlier been preferred against him but had been dismissed without prejudice, he is twice prejudiced:

1) he has been faced with two separate R.S. 4450 proceedings on the same acts, and

2) witnesses who were available at the earlier time were not available to testify in person at the time of hearing.

The record reflects that the initial R.S. 4450 proceedings were suspended because of the pendency of the criminal proceedings, and could not be reinstituted when the criminal proceedings ended because Appellant was not available at the time and place in question. Since the ensuing dismissal was "without prejudice", and not on the merits, and since the charges in the instant case were preferred within the time prescribed by the regulations, there can be no complaint as to the validity of the instant proceeding.

IV

Appellant also complains that the taking of testimony by deposition on written interrogatories is intrinsically a denial of due process by denying effective cross-examination. Admittedly, testimony by a live witness before the Examiner is more desirable. However, by the nature of the seaman's life and by the nature of these proceedings, such depositions are frequently the only means of obtaining testimony, and they are allowable.

V

Appellant points out that no entry was made in the Official Log Book. This is not a fatal defect.

A failure to make a record of an event covered by 46 U.S.C. 701-702 permits a "court" to refuse to receive any evidence as to the offense. There are three important considerations here. The refusal to hear other evidence is discretionary; an examiner in these proceedings is not a "court"; and the offense specified here is not one of those listed in section 701.

An examiner may consider the absence of a log entry in evaluating the other evidence. The Examiner did so in this case and was persuaded by the other evidence available that the offense

alleged occurred.

VI

There is one issue raised by Appellant which would ordinarily not be persuasive: that there is a substantial discrepancy in the testimony of the two witnesses deposed by the Investigating Officer concerning the times of the acts. Usually, recollections of time need not be found synchronous when it is obvious that two witnesses are talking about the same series of acts.

There are other considerations however, peculiar to this case.

The Examiner found that the events commenced at about 2330 on 10 October 1966. In his Opinion he recognized that the witness Mitchell testified that the events took place between 0330 and 0400 on 10 October, while the witness wise testified that what he saw of the events took place between 2300 and 2400 on 10 October. The Examiner noted that the difference in time was immaterial because it was obvious that "a serious altercation did take place on board this ship on or about October 10, 1966". The Examiner accepted the time set by Wise because it was corroborated by the chief mate who was a defense witness.

While the evaluation of the evidence by the trier of facts is not normally permitted to be challenged on appeal, a fact of utmost importance here is that the witness Mitchell, whose testimony was rejected as to the time, was the only one who claimed to have been present at the beginning of the altercation. (Wise did not enter the picture until some time later, when the action had moved from one place to another.) Mitchell's initial testimony, which covered all of the events very vividly, definitely is keyed to the time when he said he was on duty as the 12-4 oiler and was, commencing at about 0315, going about his business of calling the 4-8 watch. The altercation commenced, he said, when he had stopped off at the messroom for some "night lunch", and that the argument between Appellant and Bruce was about the quality of the night lunch.

This is not the place to rationalize how the witness could have been off four hors in his testimony, although precise in his description of his duties and activities at the time. But some explanation is to be expected of the trier of fact to justify the weight given to Mitchell's testimony as to events to which he was the sole witness while rejecting his testimony as to time.

No rationalization was offered by the Examiner. In a case so important as to result in revocation of a seaman's license and document, the testimony of the one witness who claimed to have seen everything should be closely scrutinized before his firm

identification of the time is rejected without impeachment of the quality of the rest of his testimony.

(It must also be noted here that the testimony of Mitchell as to his watch implies that HARVARD VICTORY, at anchor in Saigon, was on sea watches while the testimony of the witness Wise, who was a fireman-watertender, whose watches would be presumed to coincide with Mitchell's, if they were on the same watch, or to be end-to-end with Mitchell's if they were not, was that his duty at the time was from 0800 to 1600, which would imply the crew was standing "port" watches.)

VII

Apart from this, it is noted that the witness Mitchell's testimony, after the propounding of Interrogatory 16 which poses a general question as to anything which had occurred between Appellant and Bruce on 10 October 1966, continued for 62 lines of transcript telling what he saw when he was calling the relief watch for 0400. (A salient point is that he specifically testified that he reported the matter to the chief mate, then went about his job of calling the watch, which he was late in doing, and returned to the scene where he found Appellant still "stomping" Bruce's head and the chief mate trying to stop the affray.)

The very next interrogatory, after the general one, was directed to whether the witness had seen Appellant and Bruce "at about 11:15 a.m., on Monday, 10 October 1966". The answer was "Yes, I did." The succeeding interrogatories elicit specific answers which parallel the general story given in reply to Interrogatory 16. Interrogatory 24 again specifically adverts on the time "11:15 a.m. on Monday, 10 October 1966", as does Interrogatory 27. The specific questions which, in effect, brought out the same story as had the general Interrogatory 16, run from 17 through 24. All are keyed to the time 11:15 a.m.

The Investigating Officer declared when he requested the depositions on written interrogatories that his question were expressly based upon a statement earlier made by Mitchell to an F.B.I. agent a month after the episode. It must be assumed then that he used the times given in the earlier statement when he specified the time in Interrogatories 17, 24, and 27 as "11:30 a.m."

It is possible that on the taking of the deposition an error was made and "a.m." was substituted for "p.m." If this is so, there is no way that I can tell on review since neither the written application, the original interrogatories, nor the orders to take the depositions appear in the record. At best, I must rely upon an

assumption that the Examiner compared the interrogatories as propounded with those submitted in the deposition and found them correct.

It is clear that if "a.m." was in the authorized interrogatories, and if those interrogatories were based upon an earlier statement of the witness to an F.B.I. agent, the testimony of the witness given after the general interrogatory which merely asked, in effect, "What happened between these two men?" was inconsistent with the earlier statement because his answer to Interrogatory 16 definitely places everything at 0330 and later.

Even if I assumed that an error had occurred and a change from "p.m." to "a.m." had been made and not been detected, there is another problem which cannot be resolved on this record. Assuming that "11:15 p.m." was in the original interrogatories, and that "11:15 p.m." was based upon Mitchell's earlier statement, there is an obvious discrepancy between the earlier statement on which the question was based and his answer to Interrogatory 16 which placed the events as beginning at 0330.

I cannot speculate on this because, as will be mentioned again, the earlier statement is not part of the record.

VIII

To turn to the deposition of the witness Wise, on which the Examiner relied to find that the events occurred at and after 2330, and not at and after 0330, on 10 October 1966, I find that in answer to a general interrogatory as to what occurred between Appellant and Bruce on 10 October 1966 (Interrogatory 16), the witness testified for over thirty lines of transcript as to events which began about 11:30 p.m.

Once again, the next interrogatory, 17, is directed to "11:30 a.m. on Monday, 10 October 1966". The witness Wise apparently recognized than this was a different time from what he described occurring at 2300 on 10 October 1966 because he said that the time referred to must have been the next day because it was "11:30 a.m." and that at that time Appellant was on board and Bruce was in the hospital.

Here again there is the problem of time. Here again, the Investigating Officer stated that his interrogatories were based upon a statement which the witness Wise had earlier made to an F.B.I. agent. If this is so either (1) the interrogatories were mistakenly drawn up to show 11:30 a.m. as the time of the occurrence, or (2) the same error was made in propounding the interrogatories at a different time and place from these at which

interrogatories were propounded to the witness Mitchell, or (3) the testimony of the witness Wise in his general description of events at 2330 and after in reply to Interrogatory 16, was also inconsistent with his earlier statement to the F.B.I.

IX

Resolution of the foregoing questions must be made by the Examiner at the hearing; not by speculation on an appeal from revocation of a seaman's license and document. The record on appeal should contain no gaps or omissions at cardinal points.

X

There is a further inadequacy in the record in this case. As to both the witnesses whom the Investigating Officer sought to depose on written interrogatories, the Investigating Officer perceived that the length of time between the episode to be testified to and the deposition itself might have dimmed the recollection of the witness. He therefore directed the attention of the witnesses to their having made earlier statements as to the same matters, and several questions to each established that each had made a statement to F.B.I. agents.

Appellant objected to the showing of these statements to the witnesses but was overruled by the Examiner on the grounds that the recollection of a witness properly could be reviewed by review of a statement which he had made earlier.

When the Interrogatories were propounded to the witness Mitchell he was instructed by the propounder, who is described by the record as reading to the witness, before propounding Interrogatory 16: "Instruction: If you are unable to recall the matters covered by some or all of the following questions, you may read Exhibit One in order to refresh your memory as to the matters questioned about. If, after refreshing your memory, you are able to achieve an independent recollection of some or all of the matters to be asked about by a particular question, you may proceed to answer that question with your recollection thus refreshed; however, before answering a question you must place Exhibit One aside and not refer to it as you answer the question."

The record of the deposition of Mitchell shows that, before the "instruction" was given, the witness was shown "Exhibit One" prior to the posing of Interrogatory 11. It also shows that after the quoted "instruction" was read to the witness he was again shown "Exhibit One".

The record of the deposition does not reflect that the witness

at any time declared that his recollection required refreshing.

The record of the deposition of the witness Wise fails to show that after the preliminary questions had established that an earlier statement had been made to an F.B.I. agent, an "Exhibit" was shown to the witness and then an "instruction" was given to the witness as to how the "Exhibit" was to be used.

Since the Investigating Officer spoke of interrogatories to his witnesses concurrently and in the same terms, it could be assumed that the same "instructions" were to be given to both witnesses as to the use of "Exhibit One"".

If they were, the record does not reflect this and I cannot resolve the question because, as mentioned before, the record before me does not contain the Examiner's order directing the taking of the interrogatories and the propounding of the "instruction" read to the witness Mitchell and apparently not read to the witness Wise.

XI

In this connection, Appellant specifically objected to the Examiner at the hearing when the question of interrogatories to absent witnesses was raised, that the witnesses might, after being shown the earlier statement, merely read it instead of testifying.

Although Appellant does not specifically reiterate this objection on appeal, I cannot overlook the fact that the witness Mitchell, before the general Interrogatory 16 was posed to him, was shown "Exhibit One" without Mitchell's having stated that he needed to have his recollection refreshed, that Mitchell testified then, without further question, for over two pages of transcript, that this testimony was contradicted as to the time of the events by his answers to the succeeding seventy-odd interrogatories, and that the record does not reflect that "Exhibit One" was removed from Mitchell's possession while he answered the questions.

Similarly, while the record of the deposition of the witness Wise does not reflect that he was given any instruction as to the use of an "Exhibit One", it seems more than coincidental that his answer to Interrogatory 16 was almost as lengthy as was that of the witness Mitchell to his equivalent Interrogatory 16.

On the other hand the witness Wise, in response to all the questions which directed his attention to "11:30 a.m." on 10 October 1966, made it clear that he was talking about "11:30 p.m.".

This could be explained by various assumptions: (1) that

there was an error in the transcription of the earlier statement made by Wise in that when he had said "11:30 p.m." the statement read "11:30 a.m.", or (2) that when the Investigating Officer framed his questions for the interrogatories he inadvertently changed "p.m." to "a.m.", or (3) that those taking the depositions had changed "p.m." to "a.m." (This last possibility seems unlikely because the testimony of Mitchell was taken at a different time and place from that at which Wise was deposed and both refer to "11:30 a.m.").

Speculations to resolve this point cannot be resorted to when revocation of a seaman's license and document is at stake. Therefore the record is insufficient.

XII

As reported, the procedure used in showing the earlier statement to the witness Mitchell was defective. It has been noted that an "Instruction" was "read" to Mitchell in the course of propounding the interrogatories, and that no such "instruction" was read to the witness Wise. An identical series of questions relating to earlier statements were posed to the two defense witnesses, but no "instruction" was read to them on the record. But there is no evidence in the record to establish whether the conditions of the deposition were supposed to be the same since neither the applications, the original questions, nor the Examiner's orders appear on the record.

But one thing is clear. While the theories and distinctions are complicated (see: United States v. Riccardi, CA3 1949, 174 F. 2nd 883), refreshing the recollection of a witness on the stand is permissible only when the witness manifests at least a temporary failure of recollection. The witness Mitchell was shown "Exhibit One" before he exhibited any need for assistance, before he was even asked whether he had made an earlier statement, indeed after all he had done was identify himself and Appellant.

XIII

It is recognized that there are difficulties attendant upon the anticipation of lapses in the recollection of a witness being deposed on written interrogatories. These difficulties can be overcome by careful preparation of alternative interrogatories and careful instructions to the propounders in the orders to take the depositions.

In the absence of such material in the record I am unwilling to affirm a revocation order based only on depositions so prepared and presented.

XIV

In the light of the other inadequacies in the record I am also concerned that the record does not reflect any effort to take the testimony of the alleged victim, Bruce, or any explanation as to why he might have been unavailable. While the assault and battery can be proved without the testimony of the victim, a failure to call the person who presumptively has the best information concerning the incident raises questions which should be explained on the record.

XV

I now turn to the post-finding record. Appellant's lengthy prior history of offenses may well have influenced the Examiner in the framing of his order. While I have no reason to question the accuracy of the prior record, it was not received in open hearing nor was it incorporated into the record of the hearing with the express consent of Appellant. (See: Decision on Appeal No. 1472.)

ORDER

The order of the Examiner dated at Seattle, Washington, on 19 August 1968, is VACATED. The findings are SET ASIDE, and the case is REMANDED to the Examiner for further proceedings consistent herewith.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this day of April 1970.

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